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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RICK WOODS, Individually and On Behalf of All Others Similarly Situated,
 	
                 Plaintiff,
 	
   v.
 	
GOOGLE INC.,
 	
                 Defendant.
	Case No. 11-cv-1263-EJD
	
	PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS
	
	Hearing Date: July 22, 2014
	Time: 10:00 a.m.
	Before: Honorable Howard R. Lloyd

1   Google's shameless disregard for this Court's Order is clear. Nothing in Google's

2   opposition suggests Google fully complied with the Order. Rather than address its own

3   noncompliance, Google attempts to sidestep the very issue before the Court, suggesting instead that

4   Plaintiff should conduct more "routine" discovery for the exact material that Google has already

5   been ordered to produce. Such a suggestion is futile here, given that this entire dispute arose

6   because Google failed to provide meaningful responses to Plaintiff's "routine" discovery served

7   more than a year and a half ago. Apparently, the Court's Order compelling answers was not

8   enough to convince Google to play by the rules. As requested in Plaintiff's motion, sanctions

9   against Google are appropriate under these circumstances to prevent further prejudice to Plaintiff

10   and encourage Google to comply with its discovery obligations and this Court's orders.

11   **I.   SUMMARY OF GOOGLE'S MISCONDUCT**

12   Despite Google's attempts to divert the Court's attention to other actions Plaintiff could

13   have taken, the only issue before the Court is whether Google complied with this Court's March 28,

14   2014 Order ("Order"). *See* Dkt. 147. More than eighteen months ago, Plaintiff submitted relevant

15   discovery requests to Google seeking click data regarding Google's Smart Pricing and Location

16   Targeting features. *See* Motion 2:13–17 (Dkt. 150). Google objected to Plaintiff's discovery

17   requests, asserting superfluous and unfounded objections, and claimed it would meet and confer in

18   good faith to resolve these issues. *See id.* 2:17–3:1. Even after an extensive meet and confer

19   process, Google was steadfast in its refusal to produce the relevant discovery sought by Plaintiff.

20   *See id.* 3:1–17. Google even refused to identify the relevant fields of data it maintains such that

21   Plaintiff could narrow his discovery requests. *See id.* Instead, counsel for Google, Eric Evans, sent

22   two letters declaring Plaintiff had access to all the data available to Google. *See* Pate Decl. to

23   Motion, Exs. L–M (Dkt. 150-1). Mr. Evans knew at the time he sent his letters, or certainly should

24   have known, that such a statement was patently false. Moreover, Mr. Evans' statements have now

25   been demonstrated to be blatantly dishonest.[1]

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26   [1] Documents produced by Google revealed Google had considerably more data in its possession
27   than was available to Plaintiff and what was described in Mr. Evans' letters. *See* Motion 3:21–4:9.
     Mr. Evans has yet to explain why his letter to Plaintiff's counsel contained inaccurate information.

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As a result, Plaintiff subsequently filed DDJR #1 (*see* Dkt. 148–49) to, *inter alia*, obtain descriptions of Google's data in an effort to narrow his discovery requests and obtain the information he originally requested. In response, Google continued its stonewalling tactics by claiming the DDJR was not procedurally proper without ever responding to its substance. *See* Order 2:2–3; 5:2–7. After confirming the DDJR was procedurally proper, on March 28, 2014, the Court entered its Order compelling Google to provide the following by April 11, 2014:

1. "descriptions of the log files and database tables Google maintains with respect to clicks and impressions, including the fields of data contained in the log files and database tables;" and

2. "data from log files relating to the clicks (and related impressions) alleged in ¶ 120 of the complaint."

Id. 5:20–23. Google failed to comply with both prongs of this Order. Accordingly, on May 14, 2014, Plaintiff filed his Motion for Sanctions ("Motion"). *See* Dkt. 150.

Significantly, Google's Opposition to Plaintiff's Motion for Sanctions (Dkt. 156) ("Opposition") **concedes** Google has not complied with this Court's Order and merely attempts to explain away its failure to do so. Google's response is twofold. *First,* while Google alleges it "complied" with the Order, Google admits it only provided: (a) "limited" and "concise" information in a convoluted, obfuscated fashion that only an expert can distill, instead of providing descriptions of all data fields as it was ordered to do; and (b) three data points for the six clicks at issue in the Order, instead of all the click data from the log files as ordered by the Court. *Second*, Google attempts to persuade the Court the real remedy for its noncompliance is not sanctions, but rather, more "routine" discovery for the same material that is the subject of the Order—material Google has avoided producing for more than a year and a half.[2] Google's Opposition is particularly ironic given Google's propensity to not answer discovery (necessitating the DDJR and Motion).

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[2] Google attempts to blame Plaintiff for its noncompliance, asserting Plaintiff should have taken a Rule 30(b)(6) deposition of Google to obtain the information he sought through a properly served request for production. The absurdity of Google's position is obvious where Google refuses to provide documents showing the structure and content of the data it maintains and steadfastly refuses to agree to more than one Rule 30(b)(6) deposition. Under these circumstances, a Rule 30(b)(6) deposition would, at best, be entirely inefficient and, at worst, be largely useless. Google should provide the requested (and relevant) information before Plaintiff commences the resource-intensive deposition process.

In short, Google has refused to answer properly served discovery and has now admittedly refused to comply with an Order from this Court. Under these circumstances, sanctions are required to break Google's cycle of noncompliance and ensure Plaintiff can efficiently litigate his case with the necessary information. As demonstrated in Plaintiff's Motion and herein, sanctions are warranted and necessary to end Google's dishonesty, wastefulness, and gamesmanship.

II. GOOGLE'S NONCOMPLIANCE

Despite Google's attempts to convince the Court of its compliance, Google has failed to comply with the Order in three ways. Specifically, Google has not provided Plaintiff with:

1. "data from log files relating to the clicks (and related impressions) alleged in ¶ 120 of the complaint;"

2. "descriptions of the log files . . . Google maintains with respect to clicks and impressions, including the fields of data contained in the log files . . .;" and

3. "descriptions of the . . . database tables Google maintains with respect to clicks and impressions, including the fields of data contained in the . . . database tables."

Order 5:20–23. Plaintiff addresses each of these failures below.

A. Google's Failure to Produce the Click Data

The Court ordered Google to produce "data from log files relating to the clicks (and related impressions) alleged in ¶ 120 of the complaint." Order 5:22–23. In its Opposition, Google attempts to sidestep its noncompliance by arguing, "Simply put: Google has provided the information *it understands to be relevant* about these clicks." Opp. 11:1–2 (emphasis added); *see also* Opp. 2:7–9 (describing Google's compliance as "*limited*") (emphasis added). However, the Court did not order Google to produce "*limited*" information or "*simply*" the information Google "*understands to be relevant*." Rather, Google was ordered to produce *all* click data for the six clicks identified in Paragraph 120. Order 5:22–23. Google admittedly did not do so—choosing instead to provide only three data points (the date, time, and IP address) for each of these clicks.[3] In fact, Google's admitted noncompliance is most aptly evinced through Google's "after-the-fact"

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[3] For example, Google produced no click data relating to Smart Pricing or the geo-location signal used by Google to display Plaintiff's ads, both of which are unquestionably "relevant."

1   offer to provide additional click data (although improperly limited to the subject of Location

2   Targeting—which is just a subset of what the Court ordered be produced). Opp. 11:2–4.[4]

3   Had Google complied with the Order, it would have produced, for the six clicks at issue,

4   ***all fields of data maintained in the log files***. This is what the Court ordered and is significant for

5   Plaintiff's development of this case. As Plaintiff stated in his Motion, complying with this Order

6   would "inform Plaintiff of the nature and content of those log files for purposes of narrowing any

7   Smart Pricing data request." Motion 6:14–15. Given that Google continues its refusal to comply

8   with the Order, even in the face of sanctions, it is clear Google has no interest in resolving this

9   issue. Thus, sanctions are necessary and appropriate to secure compliance.

10   **B.   Google's Failure to Provide Descriptions of the Log Files**

11   The Court ordered Google to provide "descriptions of the log files . . . Google maintains

12   with respect to clicks and impressions, including the fields of data contained in the log files . . ." so

13   the parties could meet and confer on the data needed to resolve Google's objections to Plaintiff's

14   discovery requests. Order 5:20–22. Again, Google has failed to comply with the Order. During

15   his deposition, Google engineer Matthew Cary testified about the differences between Google's log

16   files and its database tables. *See* Motion 6:21–26; *see also* Pate Decl. to Motion, Ex. N 208:25–

17   209:22 ("It's not a database."). Google's Opposition makes clear it only attempted to provide some

18   information about ***one*** of its databases (i.e., the "Ads Database")—and ***not*** its log files.

19   Moreover, Mr. Cary testified about a particular file that "describes the information stored in

20   the protocol buffers," which describes the data fields maintained in log files. *See* Pate Decl. to

21   Motion, Ex. N 208:25–209:22. Counsel for Google stated during Mr. Cary's deposition this file

22   would be part of the "Source Code" inspection that Plaintiff's counsel conducted on April 28, 2014.

23   *See* Pate Decl. to Reply, ¶3. However, contrary to counsel for Google's representation, Google

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25   [4] Although Google's Opposition indicates it offered to produce all Location Targeting data from log
26   files (*see* Opp. 2:10–12), it did so only ***after*** filing its Opposition. *See* Declaration of Andrew G.
     Pate in Support of Plaintiff's Reply ("Pate Decl. to Reply"), Ex. A. As of the date of this Reply,
27   Google has still not advised Plaintiff of where or when such alleged offer was made prior to filing
     its Opposition. Regardless, this is not what the Court ordered Google to produce.

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1   admits it did not produce this relevant file in compliance with the Court's Order. *See* Opp. 9:23–

2   10:5. Put simply, Google failed to provide descriptions of the log files and fields of data contained

3   therein. This failure unquestionably violates the Court's Order, thus warranting sanctions.

4   **C.   Google's Failure to Provide Descriptions of the Database Tables**

5   The Court also ordered Google to provide "descriptions of . . . database tables Google

6   maintains with respect to clicks and impressions, including the fields of data contained in the . . .

7   database tables" so the parties could meet and confer on the data needed to resolve Google's

8   objections to Plaintiff's discovery requests. *See* Order 5:20–22. Instead of complying with the

9   Order to resolve the ongoing and substantial discovery issues related to Google's data, Google

10   flouted both the letter and spirit of the Order by producing "descriptions" in such a convoluted

11   manner that it obscured the relevant fields of data. Such gamesmanship must not be condoned.

12   As stated in the Motion, Google previously demonstrated its ability to provide a list of fields

13   with descriptions in a reasonable manner. *See* Pate Decl. to Motion, Exs. L–M. Google ignores

14   this argument in its Opposition and fails to explain why it cannot do the same here. Instead, Google

15   claims to have produced "the most concise descriptions of its log files and database tables

16   available." Opp. 10:3–5. Yet, that "concise" description contained 900+ documents (improperly

17   designated as "Source Code"), many of which have absolutely nothing to do with a description of a

18   database field. *See* Pate Decl. to Reply, ¶4.

19   Moreover, Google's Opposition concedes this "concise" description is incomplete. *First*,

20   the description relates to only *one* of Google's databases (the "Ads Database"). Discovery thus far

21   has revealed Google maintains numerous other relevant databases, and Google makes no effort to

22   explain why it did not provide any information pertaining to these other relevant databases.

23   *Second*, and noticeably absent from Google's Opposition, neither an employee nor attorney for

24   Google provided an affidavit or declaration attesting that Google produced *complete* descriptions of

25   *all* database fields. This would have been simple and expected under these circumstances. Instead,

26   the declaration submitted by Google's outside lawyer, Eric Evans, merely states Google made

27   available for inspection "information about the log files and database tables Google maintains with

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1   respect to clicks and impressions." Opp., Evans Decl. 2:9–10. This is a far cry from attesting that

2   Google complied with the Order by describing all data fields. Indeed, its careful wording suggests

3   descriptions of less than all data fields were produced.

4   Through its concentrated effort to delay this litigation and avoid disclosing data

5   demonstrating the scope of the harm done to Plaintiff and thousands of advertisers who have been

6   overcharged, it is apparent Google's only interest is in creating discovery disputes, rather than

7   resolving them. Further, the lengths to which Google is willing to go to conceal its obviously

8   relevant click data shed light on what this data will show about the nature and scope of the harm at

9   issue. To secure compliance with the Court's Order, Google should be sanctioned for its conduct.

10 **III.   PLAINTIFF'S MOTION WAS PROCEDURALLY PROPER**

11   Google erroneously asserts Plaintiff was required to seek leave of court prior to filing his

12 Motion. As support for this misplaced contention, Google points to Section 2.A of the Court's

13 Standing Order re: Civil Discovery Disputes (the "Standing Order"). In actuality, however, prior to

14 filing the instant motion, Plaintiff undertook each of the steps set forth in Section 2.A.

15   As discussed *supra*, the discovery requests giving rise to the Motion were originally served

16 ***more than a year ago***. These requests were the subject of several disputes between the parties and

17 eventually required court intervention in the form of DDJR #1. *See* DDJR #1 (Dkt. 148–49),

18 generally. It was only after Google failed to comply with the Order that Plaintiff sought sanctions.

19 Thus, in attempting to resolve the parties' disputes, the parties: (1) "use[d] the customary

20 convenient means of communication" to try to reach agreement; (2) met in person in an attempt to

21 reach "full agreement"; (3) filed DDJR #1; and (4) awaited the Court's Order. When Google failed

22 to comply with the Order, Plaintiff then diligently followed the procedure set out in Section 2.F

23 which provides: "Any party seeking an award of attorney fees or other expenses in connection with

24 a discovery dispute shall file a noticed motion pursuant to the Northern District Local Rules. It

25 would ordinarily be presumptuous to file such a motion before the court has ruled on the dispute."

26 Standing Order, §2.F. Section 2.F contemplates only a "noticed motion pursuant to the Northern

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1 District Local Rules" and therefore, notwithstanding Google's misreading of the Standing Order,

2 Plaintiff was not required to seek leave of Court.

3 Google's assertion that an additional meet and confer was required prior to Plaintiff's filing

4 of the Motion is also wrong. Google mistakenly relies on Section 2.C of the Standing Order, a

5 provision which applies to the underlying discovery dispute. Here, the parties engaged in several

6 meet and confer sessions prior to filing DDJR #1, and, since that time, met in person on April 29,

7 2014, at which time Plaintiff's attempt to elicit compliance was rebuffed by Google. *See* Pate

8 Decl. to Reply, ¶5.

9 Further, Federal Rule of Civil Procedure 37 only requires "a certification that the movant

10 has in good faith conferred or attempted to confer with the person or party failing to make

11 disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37. Plaintiff

12 complied with this requirement by certifying in DDJR #1 that Plaintiff's counsel "complied with

13 Magistrate Judge Lloyd's Standing Order Re: Civil Discovery Disputes." (Dkt. 148–49).

14 Similarly, Civil Local Rules 37-1 and 37-4 do not require a meet and confer regarding the motion

15 for sanctions prior to filing. Rather Civil Local Rule 37-1 mandates that "counsel have previously

16 conferred for the purpose of attempting to resolve all disputed issues," and Civil Local Rule 37-4

17 requires that the motion "comply with Civil L.R. 7-8 and Civil L.R. 7-2." Plaintiff complied with

18 these Rules. *See* Pate Decl. to Reply, Ex. B. In addition, Plaintiff offered to attempt to resolve the

19 issues set forth in the Motion after filing. *See id.* Google, however, never responded.

20 **IV. PLAINTIFF'S REQUESTED SANCTIONS ARE APPROPRIATE**

21 A court has broad discretion in imposing sanctions for discovery abuse pursuant to Federal

22 Rule of Civil Procedure 37(b)(2)(A). *See Apple Inc. v. Samsung Electronics Co., Ltd.*, 11-cv-1846,

23 2012 WL 1595784, at *3 (N.D. Cal. May 4, 2012) ("The selection of the particular sanction is left

24 to the discretion of the trial court."). The court's discretion is limited only by the requirements that

25 the sanctions be "just" and "specifically related to the particular 'claim' which was at issue in the

26 order to provide discovery." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456

27 U.S. 694, 707 (1982).

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1   Plaintiff is not seeking to unduly penalize Google, but simply to compel Google to comply

2   with the Court's Order so that Plaintiff can prosecute his claims swiftly without further

3   stonewalling and gamesmanship from Google.   The requested sanctions are both "just" and

4   narrowly tailored. For example, Plaintiff requests the Court order Google to provide "descriptions

5   of the log files and database tables Google maintains with respect to clicks and impressions,

6   including the fields of data contained in the log files and database tables, (as previously ordered by

7   the Court), in a reasonably interpretable format." Motion 10:4–6. This request seeks nothing more

8   than to compel Google to comply with the Court's Order. *See* Order 5:20–23. Such relief is

9   undeniably "just" and "specifically related to the particular 'claim' which was at issue in the order

10   to provide discovery." *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 707.

11   Similarly, Plaintiff's request that Google be required to produce a "witness competent to

12   explain the information provided thereby and to further answer questions about the Smart Pricing

13   and Location Targeting data Google possesses in both log files and database tables," (Motion 10:9–

14   13), is appropriate given Google's hide-the-ball approach to discovery. Such a deposition would

15   allow Plaintiff to confirm Google had in fact complied with the Order and produced the requested

16   discovery, which is necessary to enable Plaintiff to propound reasonable discovery requests.[5]

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18   [5] Google's arguments regarding Plaintiff's withdrawn 30(b)(6) deposition notice and Plaintiff's
     recent interrogatories are red herrings intended to distract the Court from Google's pattern of
19   noncompliance. Notably, Plaintiff withdrew his 30(b)(6) notice after Google indicated it would not
     respond to more than one such notice. Plaintiff determined this single 30(b)(6) notice would be
20   best served following the receipt of certain discovery. Contrary to Google's argument, Plaintiff's
     litigation strategy does not preclude a court-ordered deposition regarding Google's log files and
21   database tables.

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     Similarly, the fact that Plaintiff was able to identify, and include in a recent interrogatory, certain
23   data fields for which Google collects and maintains information, does not excuse Google from its
     obligation to comply with this Court's Order. The interrogatory Plaintiff served on May 23, 2014 is
24   based on the very limited data and information that Plaintiff has received to date.   Plaintiff's
     proactive discovery efforts to obtain information to further develop his case do not relieve Google
25   of its burden to comply with the Order. Rather than participate in good faith in the discovery
     process, Google wants Plaintiff to continue to try and guess the right question to ask without telling
26   Plaintiff anything about its databases or log files, despite the fact that proper discovery requests on
     this very issue have been pending for more than a year.
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     PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO
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1   Further, Plaintiff's request that Google bear the burden of traveling to Austin, Texas for

2   future in-person discovery conferences and the 30(b)(6) deposition discussed above is likewise an

3   appropriate sanction given Google's pattern of noncompliance. Plaintiff is not seeking to avoid

4   further investment in the case, *see* Opp. 12:10–14, but rather is seeking to avoid expenses

5   necessitated only by Google's gamesmanship.[6] Moreover, Section 2.C of the Court's Standing

6   Order requires "***Lead Counsel***" to meet "in person for as long as and as often as is needed to reach

7   full agreement" regarding a discovery dispute. Standing Order, §2.C. Here, Lead Counsel is

8   located in Austin, Texas. Thus, Google's contention that "Plaintiff[] [has] three attorneys of record

9   with offices in San Francisco," Opp. 12:5–8, is irrelevant.[7] Requiring Google to travel to Plaintiff's

10   counsel's office in Austin, Texas for further discovery conferences and the requested deposition

11   would serve to discourage Google from engaging in further discovery abuse. *See, e.g.*, *United*

12   *States v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365, 1370 (9th Cir. 1980) ("[S]anctions

13   were also necessary to further the third objective of Rule 37(b): generally deterring flagrant

14   disobedience and callous disregard of court discovery orders.").[8]

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17   [6] For example, Google criticizes Plaintiff for failing to bring an expert to California to review the
18   900+ documents it improperly designated as containing "Source Code." Opp. 1:3–4, 1:26–27;
      4:22–5:1; and 10:15–17. However, because the documents made available for review by Google
19   were not complete or responsive, it would have been inefficient and wasteful for Plaintiff to have
      his expert conduct such a review.

20   [7] Google's argument regarding counsel for Plaintiff's access to aircraft is also irrelevant, as Google
21   undeniably has access to private aircraft. *See* http://www.fastcompany.com/3023502/check-out-
      googles-new-82-million-corporate-jet-facility.

22   [8] Despite Plaintiff's explicit indication in his Motion for Sanctions that he "does not request a ruling
23   regarding the propriety of the 'Source Code' designation," Motion 5, n.2, Google accuses Plaintiff
      of seeking to circumvent the Court's Standing Order and challenge Google's "Source Code"
24   designations. This argument misconstrues the relief Plaintiff seeks. Through the Motion, Plaintiff
      is not requesting Google de-designate any Source Code documents. Rather, Plaintiff is seeking the
25   descriptions and data the Court originally ordered Google to provide. To the extent any such
26   descriptions are properly designated Source Code, then Google may produce them for inspection at
      Plaintiff's Counsel's offices in Austin or Google's offices in Austin, where all agreed upon
27   precautions to protect Source Code can be employed.

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PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO
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1   The sanctions Plaintiff seeks are not only "just" and narrowly tailored to Google's failure to

2   comply with the Court's Order, but are also well within the Court's discretion.

3   **V.   CONCLUSION**

4   Plaintiff served proper discovery requests. Google objected to these requests asserting it

5   would meet and confer in good faith to further respond. Plaintiff exhausted the meet and confer

6   process with little progress. Specifically, Google failed to provide the most basic information

7   necessary for any meaningful meet and confer, which led to DDJR # 1. The Court then issued its

8   Order compelling production of certain information, which Google admits it has still failed to

9   provide. Under these circumstances, sanctions are not only appropriate, but also necessary.

10   Despite Google's protestations to the contrary, the sanctions requested by Plaintiff are

11   tailored to address Google's improper conduct. However, should the Court choose to exercise its

12   discretion to award other sanctions, the Court could certainly and properly consider striking

13   Google's objections to Plaintiff's First Requests (Nos. 3 & 9) and Second Requests (Nos. 7, 12, 22,

14   23, 24 & 37) and ordering Google to immediately produce the requested information. Additionally,

15   given the ongoing discovery disputes and Google's description of this case as "complex and

16   technical" and involving the "most complex SQL databases in the world," the Court would

17   certainly be justified in appointing a Special Master (as previously requested by Plaintiff), at

18   Google's expense, to facilitate the exchange of relevant information in this case. *See* DDJR #2

19   7:20–24 (Dkt. 130); *see also* Standing Order, §2.G ("When the parties have become, or expect to

20   become, engaged in a succession of discovery disputes…the court recommends they consider

21   appointment of a Special Master.").

22   Regardless of the sanctions that may be issued, one thing is clear: Google's incessant

23   stonewalling of Plaintiff's efforts to obtain relevant discovery in this matter must end. Plaintiff

24   expected the Court's Order would have convinced Google to participate in the discovery process in

25   good faith. However, Google continues the same pattern and practice of discovery abuse that

26   brought the parties to file the initial DDJR nearly a year ago. Plaintiff respectfully requests the

27   Court sanction Google to end this cycle of misconduct and secure compliance with the Order.

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Dated: June 4, 2014

Respectfully submitted,

/s/ Andrew G. Pate

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 4, 2014.

/s/ Andrew G. Pate